Public Prosecutor v Musdar bin Rusli

COURT OF APPEAL (KOTA KINABALU) — CRIMINAL APPEAL NO S-05–372–12 OF 2014
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
13 APRIL 2017

Criminal Procedure — Charge — Reduction of — Accused charged with murdering wife by stabbing her with knife six times on her chest and back — One stab wounds severed artery and damaged heart — Doctor who performed post-mortem testified stab wounds were intentionally caused and not accidental and fatal wound sufficient in ordinary course of nature to cause death — Whether this medical evidence brought case within definition of murder and not culpable homicide not amounting to murder even if, subjectively, accused had no intention to kill — Whether so long as grievous injury intentionally caused, if medical evidence established that injury sufficient in ordinary course of nature to cause death, act of inflicting injury was murder

The respondent ('the accused') was charged in the High Court for murdering his wife of 20 years ('the deceased') and also for attempting to commit suicide after the murder by stabbing himself with the same knife that was used in the killing. The two incidents took place in the couple's house in workers' quarters in a plantation in Kinabatangan, Sabah. The prosecution's evidence was wholly circumstantial. On the evening of the incidents, a neighbour, PW7, saw the accused vainly trying to stop his baby from crying. He was trying to get the baby to sleep but as the crying did not stop, the deceased came out from her kitchen, rocked the baby until it went to sleep and then returned to the kitchen, grumbling. Minutes later, PW7 heard a woman cry out in pain and then saw the accused standing at his kitchen door with one hand gripping the deceased's neck and the other holding a knife. The deceased was struggling and trying to free herself. PW7 said she ran to a neighbouring house to alert the deceased's son, PW8, who was watching television there. PW8 rushed back to his house and saw his parents facing each other — the accused had his hand on the deceased's chest — and then his mother collapsing. PW8 then saw the accused stab himself. The doctor ('PW1') who carried out the post-mortem on the deceased found three stab wounds on her chest and another three on her back and opined that it was a backward-directed stab wound on the chest that caused the death because it severed an artery and cut parts of the heart. PW1 testified that the injury was sufficient in the ordinary course of nature to cause death and that the stab wounds did not seem to have been accidental but intentionally caused. The accused denied stabbing the deceased. He said he was unwell for several days and when he returned home from work on the day in

A question, he found his baby crying and the deceased cooking in the kitchen. He tried to rock his baby to sleep but failed. Irritated by the baby's relentless crying, the accused took the baby to the deceased but she started nagging him for not helping her do the house work. The accused said the nagging got to a point where he pulled the deceased's hair and pushed her to the floor. He said he then
B took a knife and stabbed himself. The High Court rejected the accused's defence and held that there was overwhelming evidence to show that he had inflicted the injuries on the deceased. The trial court held that although there was evidence to show the accused intended to cause bodily injuries which were likely to have caused the deceased's death, there was no intention to kill; that
C the accused's stabbing of the deceased was the result of her nagging coupled with the fact that he was ill. For that reason, the trial judge reduced the charge to culpable homicide not amounting to murder and convicted and sentenced the accused on that charge to 25 years' jail. The accused was sentenced to a
D year's jail on the attempted suicide charge. In the instant appeal against the reduction of the murder charge, the prosecution submitted that based on the medical evidence and the nature of injuries caused to the deceased, the trial court ought to have found that the murder charge had been proven beyond reasonable doubt.

E

Held, allowing the appeal, setting aside the conviction and sentence for culpable homicide not amounting to murder, restoring the original murder charge and convicting the accused on the same and sentencing him to death:

F (1) To sustain a charge of murder under limb (c) of s 300 of the Penal Code, the prosecution had to prove by evidence, either direct or circumstantial, from prosecution witnesses that the injury sustained by the deceased was intentionally caused by the accused. For the second part of the same limb (c), the prosecution had to lead evidence through the medical
G doctor that such injury was sufficient in the ordinary course of nature to cause the death of the deceased. This part of the enquiry was purely objective and had nothing to do with the intention of the offender. If the offender inflicted injury of that kind, he had to face the consequences, which he could only escape from if it could be shown, or reasonably
H deduced, that the injury was accidental or otherwise unintentional. The prosecution had established the second part of limb (c) through PW1's testimony. PW1 found that the cause of death was a stab wound that was directed backward cutting the intercostal muscle, the pericardium, the ascending aorta, the right atrioventricular and the right atrium. PW1
I testified that that injury was sufficient in the ordinary course of nature to cause death, and also that the deceased was stabbed repeatedly and it was not accidental. In view of the medical evidence, the instant case was not one which could be brought within the lesser offence of culpable homicide not amounting to murder (see paras 41, 43 & 47).

(2) In the absence of other circumstances which would totally or partially negate criminal intention, the accused was deemed to have intended the consequences of his acts, ie, that he had intended the injuries which were inflicted by him on the deceased's chest which, objectively, was a critical part of the human anatomy. The injury sustained by the deceased was fatal when the main artery was severed. This clearly evinced the intention on the part of the accused to cause bodily injury to the deceased. The evidence of the prosecution at the end of its case at trial brought the case squarely within the ambit of s 300 of the Penal Code. In the absence of any evidence to the contrary, the accused, by inflicting those injuries, must have intended to kill the deceased. The accused's defence was a mere denial. He did not plead that his case fell within any of the exceptions to s 300 of the Penal Code. The trial judge was therefore wrong to have reduced the charge under s 300 to one under s 304(a) on the ground that the accused had stabbed the deceased because she had subjected him to constant nagging (see paras 42, 44–45 & 48).

(3) PW7 and PW8 testified that the injuries sustained by the deceased were attributable to the accused. The court agreed with the trial judge's finding that there was sufficient circumstantial evidence that proved the nexus between the accused and the deceased's death. Though circumstantial, the evidence was so cogent and strong that it allowed the trial judge to draw the only irresistible inference that the accused was the one who had caused her death (see paras 36 & 42).

[Bahasa Malaysia summary

Responden ('tertuduh') telah dituduh di Mahkamah Tinggi kerana membunuh isterinya yang telah bersamanya 20 tahun ('si mati') dan juga kerana cuba membunuh diri selepas pembunuhan itu dengan menikam dirinya sendiri dengan pisau yang sama yang telah digunakan semasa pembunuhan itu. Dua kejadian berlaku di rumah pasangan itu dalam kuarters pekerja dalam ladang di Kinabatangan, Sabah. Keterangan pendakwaan adalah sepenuhnya mengikut keadaan. Pada petang kejadian tersebut, seorang jiran, PW7, melihat tertuduh gagal untuk cuba menghentikan tangisan bayinya. Dia cuba menidurkan bayi itu tetapi oleh kerana tangisan itu tidak berhenti, si mati keluar dari dapur, mendodoikan bayi itu sehingga ia tidur dan kemudian kembali ke dapur, dengan merungut. Beberapa minit kemudian, PW7 terdengar jeritan seorang wanita dalam kesakitan dan kemudian melihat tertuduh berdiri di pintu dapur dengan satu tangan menggenggam leher si mati satu satu lagi memegang pisau. Si mati sedang bergelut dan cuba melepaskan diri. PW7 mengatakan dia lari ke rumah jiran untuk memberitahu anak si mati, PW8, yang sedang menonton televisyen di situ. PW8 bergegas balik ke rumahnya dan melihat ibubapanya menghadap satu sama lain — tertuduh dengan tangan di dada si mati — dan kemudian ibunya rebah. PW8 kemudian melihat tertuduh menikam dirinya. Doktor ('PW1') yang menjalankan bedah

siasat ke atas si mati mendapati tiga luka tikaman di dadanya dan tiga lagi di belakangnya dan berpendapat bahawa ia adalah luka tikaman di belakang di dada yang telah menyebabkan kematian kerana ia telah memutuskan satu arteri dan memotong bahagian jantung. PW1 memberi keterangan bahawa kecederaan itu mencukupi dalam perjalanan biasa untuk menyebabkan kematian dan bahawa luka tikaman itu tidak kelihatan tidak disengajakan tetapi dilakukan dengan sengaja. Tertuduh menafikan telah menikam si mati. Dia memberitahu yang dia tidak sihat untuk beberapa hari dan apabila dia pulang ke rumah dari kerja pada hari yang dipersoalkan, dia mendapati bayinya menangis dan si mati sedang memasak di dapur. Dia cuba untuk mendodoikan bayinya supaya tidur tetapi gagal. Berasa jengkel dengan tangisan bayi yang tidak berhenti, tertuduh mengambil bayi itu kepada si mati tetapi dia mula meleternya kerana tidak membantunya dengan kerja rumah. Tertuduh memberitahu leteran itu sehinggakan dia menarik rambut si mati dan menolaknya ke lantai. Dia memberitahu dia kemudian mengambil pisau dan menikam dirinya sendiri Mahkamah Tinggi menolak pembelaan tertuduh dan memutuskan bahawa terdapat keterangan yang jelas menunjukkan bahawa dia telah menyebabkan kecederaan ke atas si mati. Mahkamah perbicaraan memutuskan bahawa meskipun terdapat keterangan untuk menunjukkan tertuduh berniat menyebabkan kecederaan kepada badan yang berkemungkinan telah menyebabkan kematian si mati, tidak terdapat niat untuk membunuh; bahawa tikaman tertuduh kepada si mati adalah akibat leterannya dan juga fakta yang dia tidak sihat. Oleh sebab itu, hakim perbicaraan telah mengurangkan pertuduhan kepada pembunuhan tanpa niat yang tidak menyebabkan kematian dan mensabitkan dan menghukum tertuduh atas pertuduhan tersebut kepada 25 tahun penjara. Tertuduh dihukum setahun penjara atas pertuduhan cubaan membunuh diri. Dalam rayuan ini terhadap pengurangan pertuduhan membunuh, pendakwaan berhujah bahawa berdasarkan keterangan perubatan dan sifat kecederaan yang dialami ke atas si mati, mahkamah perbicaraan patut mendapati bahawa pertuduhan membunuh itu telah dibuktikan melampaui keraguan munasabah.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman untuk pembunuhan tanpa niat yang tidak menyebabkan kematian, mengembalikan pertuduhan asal dan mensabitkan tertuduh pada yang sama dan menjatuhkan hukuman mati ke atasnya:

(1) Untuk mengekalkan pertuduhan membunuh di bawah cabang (c) kepada s 300 Kanun Keseksaan, pendakwaan telah membuktikan melalui keterangan, sama ada secara langsung atau mengikut keadaan, dari saksi-saksi pendakwaan bahawa kecederaan yang dialami oleh si mati telah disebabkan dengan niat oleh tertuduh. Bagi bahagian kedua cabang (c) yang sama, pendakwaan telah mengemukakan keterangan melalui doktor perubatan bahawa

kecederaan sedemikian adalah mencukupi dalam perjalanan biasa sifatnya untuk menyebabkan kematian si mati. Bahagian siasatan ini adalah objektif semata-mata dan tiada kaitan dengan niat pesalah. Jika pesalah menyebabkan kecederaan jenis itu, dia perlulah berhadapan dengan akibatnya, yang dia hanya boleh melepaskan diri daripadanya jika ia boeh ditunjukkan, atau disimpulkan secara munasabah, bahawa kecederaan itu tidak disengajakan atau sebaliknya tidak diniatkan. Pendakwaan telah membuktikan bahagian kedua cabang (c) melalui keterangan PW1. PW1 mendapati bahawa sebab kematian adalah luka tikaman yang diarahkan di bahagian belakang yang telah memotong otot intercostal, perikardium, aorta yang menaik, atrioventrikular kanan dan atrium kanan. PW1 memberi keterangan bahawa kecederaan itu mencukupi dalam perjalanan biasa untuk menyebabkan kematian, dan juga si mati telah ditikam berkali-kali dan ia bukan suatu yang tidak disengajakan. Berdasarkan keterangan perubatan, kes ini bukan satu yang boleh disifatkan sebagai kesalahan yang kurang daripada suatu pembunuhan tanpa niat yang tidak menyebabkan kematian (lihat perenggan 41, 43 & 47).

(2) Dengan ketiadaan keadaan lain yang secara keseluruhan atau sebahagiannya menidakkan niat jenayah itu, tertuduh dianggap telah berniat untuk mendapat akibat itu daripada tindakannya, iaitu dia telah berniat untuk menyebabkan kecederaan yang dilakukannya ke atas dada si mati yang mana, secara objektifnya, adalah bahagian kritikal anatomi manusia. Kecederaan yang dialami oleh si mati adalah memudaratkan apabila arteri utama itu terputus. Ini jelas menunjukkan niat di pihak tertuduh untuk menyebabkan kecederaan badan ke atas si mati. Keterangan pendakwaan di akhir kesnya semasa perbicaraan menyebabkan kes itu terjatuh dalam skop s 300 Kanun Keseksaan. Dengan ketiadaan apa-apa keterangan yang bertentangan, tertuduh, dengan melakukan kecederaan tersebut, mestilah telah berniat untuk membunuh si mati. Pembelaan tertuduh hanya satu penafian. Dia tidak mempli bahawa kesnya terjatuh dalam mana-mana pengecualian kepada s 300 Kanun Keseksaan. Hakim perbicaraan dengan itu terkhilaf kerana mengurangkan pertuduhan di bawah s 300 kepada suatu di bawah s 304(a) atas alasan bahawa tertuduh telah menikam si mati kerana dia telah meleterinya secara berterusan (lihat perenggan 42, 44–45 & 48).

(3) PW7 dan PW8 telah memberi keterangan bahawa kecederaan yang dialami oleh si mati disebabkan oleh tertuduh. Mahkamah bersetuju dengan dapatan hakim perbicaraan bahawa terdapat keterangan mengikut keadaan yang mencukupi untuk membuktikan kaitan antara tertuduh dan kematian si mati. Walaupun mengikut keadaan, keterangan itu meyakinkan dan kukuh sehingga ia membenarkan hakim perbicaraan membuat satu-satunya inferens yang tidak boleh disangkal

A bahawa tertuduh satu-satunya yang telah menyebabkan kematian si mati (lihat perenggan 36 & 42).]

Notes

B For cases on reduction of charge, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1850–1854.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
C *Chan Chwen Kong v PP* [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 10, FC (refd)
Joseph v State of Kerala [2005] 5 SCC 197, SC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
D *Mazlan bin Othman v PP* [2012] MLJU 1786; [2013] 1 AMR 615, CA (refd)
Phulia Tudu and anr v The State of Bihar (Now Jharkhand) AIR 2007 SC 3215, SC (refd)
Poh Weng Nam v PP [2013] 4 CLJ 1096, CA (refd)
PP v Megat Shahrizat bin Megat Shahrur [2011] MLJU 502; [2011] 8 CLJ 893, FC (refd)
E *PP v Thenegaran a/l Murugan* [2013] 3 MLJ 328; [2013] 4 CLJ 364, CA (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
State of AP v Rayavarapu Punnayya [1976] 4 SCC 382, SC (refd)
F *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, FC (distd)
Virsa Singh v State of Punjab 1958 AIR 465, SC (refd)

Legislation referred to

Indian Penal Code [IND]
G Penal Code ss 299, 299(a), (b), (c), 300, 300(a), (b), (c), (d), 302, 304(a)

Appeal from: Criminal Trial No S45–302–2/6 of 2013 (High Court, Sandakan)

H *Adam Mohamed (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*
Abdul Ghani Zelika (Abdul Gani Zelika & Amin) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

I

INTRODUCTION

[1] The respondent was charged before the Sandakan High Court for murder and attempt to commit suicide. The charges read as follows:

First charge:

That you on 2.5.2012 at about 6.30 pm, at an unnumbered house at the Perumahan Pekerja Kampung Arau, Ladang Genting Tanjung in the District of Kinabatangan, in the State of Sabah, did commit a murder by causing a death to one, Intan Bago (Passport No AM 282072) and thereby committed an offence punishable under section 302 of the Penal Code.

Second charge:

That you on 2.5.2012 at about 6.35 pm, at an unnumbered house at the Perumahan Pekerja Kampung Arau, Ladang Genting Tanjung in the District of Kinabatangan, in the State of Sabah, had attempted to commit suicide by stabbing yourself with a knife, and thereby, committed an offence punishable under section 309 of the Penal Code.

[2] The respondent had pleaded guilty to the second charge and he was accordingly convicted. The learned High Court judge postponed sentencing for the second charge until the conclusion of the trial in respect of the first charge.

[3] At the end of the trial of the first charge, the respondent was convicted for an offence of culpable homicide not amounting to murder punishable under s 304(a) of the Penal Code ('the PC'). He was sentenced to 25 years imprisonment commencing from the date of his arrest. The respondent was also sentenced to one year imprisonment in respect of the second charge. The learned High Court judge ordered that both sentences to run concurrently and upon completion of his sentences, the respondent be deported to his country of origin. Aggrieved by the impugned conviction and sentence in respect of the reduced charge, the public prosecutor ('PP') has now appealed to this court.

[4] We have heard learned deputy public prosecutor ('DPP') and learned counsel for the respondent at some length. We have also perused the written submissions carefully and gone through the record of appeal in its entirety. For the reasons that follow, we found there was merit in this appeal and accordingly we allowed the appeal by the PP. We set aside the conviction and sentence of the learned trial judge and substituted it with an order of conviction for murder as originally charged. The respondent was sentenced to death as prescribed under s 302 of the Penal Code.

THE FACTUAL BACKGROUND

The prosecution's case

[5] The antecedent facts giving rise to this appeal may be stated in brief as follows. The respondent and one Intan Bago ('the deceased'), both Indonesians, were husband and wife for 20 years and blessed with nine

A children. The respondent was a palm fruit harvester at Ladang Genting Tanjung ('the plantation') and the deceased was a general worker involved in the ablation process. Their child, Sabri bin Musdar ('PW8'), was also a palm fruit harvester.

B **[6]** The respondent and the deceased were allotted quarters within the said plantation. The respondent and the deceased occupied one house whilst another was occupied by other plantation workers, Ansyalmi Nadus ('PW9') and her husband, Martin. Ratang Erna Ardi ('PW7') occupied a house behind the deceased's residence.

C

[7] On 2 May 2012, at about 6.30pm, PW7 was at the kitchen and she saw the respondent gripped the deceased's neck while holding a knife. She was terrified and ran to Martin's house looking for PW8. At the material time, PW8 was watching television programme at Martin's house. PW8 heard PW7 called out his name and PW8 went back to his house to check on his parents. He saw his parents stood facing each other and the respondent had his hand placed on the deceased's chest. The deceased then collapsed and PW8 saw the respondent stabbing himself.

D

E

[8] On 7 May 2012, Dr Jessie Hiu ('PW1'), conducted a post-mortem on the deceased and prepared a post-mortem report ('exh P6'). She found three stab wounds on the deceased's front chest and another three stab wounds on the back of the chest. There were two lacerations on the deceased's face with multiple abrasions on the forehead and bruises on the upper lip, with dislocation of the upper tooth. She opined that it was the stab wound under mid front of the chest (injury No 7 in the post-mortem report) that caused the deceased's death. The wound was directed backward.

F

G **[9]** Inspector Razlan bin Abdul Razak ('PW12') from the police forensic team, recovered a knife ('exh P16a') and a knife sheath ('exh P20a') near the deceased's body. PW12 collected blood sample swab ('exh P21a') on the knife sheath for forensic DNA analysis.

H **[10]** The items were analysed by Zaliha bt Saudi ('PW6'), a science officer at the Chemistry Department. She found that the DNA profile on exh P16a matched that of the respondent. She also found that the respondent and the deceased were the contributors of the mixed DNA profile found on the cotton swab P21a.

I

Findings of the High Court at the close of the prosecution's case

[11] After conducting a maximum evaluation of the evidence, both oral and documentary, the learned trial judge held that the prosecution had succeeded

in establishing a prima facie case against the respondent for murder. The respondent was called to enter his defence.

The defence case

[12] The respondent gave evidence on oath. He testified that he had been unwell for days and returned home from work early on that fateful day. Their son was crying and the deceased was cooking in the kitchen. The respondent held his son and tried to sooth the baby by rocking him back and forth. However, the baby continued to cry. Unable to withstand the crying, the respondent took the baby to the deceased. Once he got to the kitchen the deceased started nagging at him for his failure to assist her in doing the household chores. The nagging finally got to the respondent causing him to pull the deceased's hair and pushed her to the floor. The respondent then took a knife and stabbed himself. The respondent denied stabbing the deceased as he loved his wife.

Findings of the High Court at the end of trial

[13] At the conclusion of the trial, the learned trial judge rejected the respondent's defence that he did not stab the deceased. His Lordship found that based on the circumstances of the case and the nature of injuries inflicted upon the deceased, there was evidence of an intention on the part of the respondent to cause bodily injuries on the deceased which is likely to cause death. However, the learned trial judge found that the prosecution had only succeeded in proving a case of culpable homicide not amounting to murder, and he proceeded to convict and sentence the respondent on the reduced charge of culpable homicide not amounting to murder. Thus this appeal by the learned DPP before us.

THE APPEAL

[14] Before us, the main thrust of the learned DPP's argument is that the learned trial judge had erred in amending the charge to one under s 304(a) of the PC on the ground that the respondent had no intention to kill the deceased. This is contrary to the evidence brought on record. Learned DPP submitted that in view of the injury caused on the vital part of the body ie the chest, a conviction under s 302 of the PC, should have been recorded against the respondent. Learned DPP posited that the view taken by the learned trial judge is patently erroneous in law as the offence of murder was clearly made out. She urged this court to allow the appeal.

[15] In reply, learned counsel for the respondent contended that taking the prosecution's case on its face value, it was not a case of murder but it was a case appropriately falling under s 304(a) of the PC. Learned counsel pointed out

A that there was no intention on the part of the respondent to commit the murder of his own wife. The relationship between the respondent and the deceased was amicable and the same has been clearly borne out in the testimony of PW7.

B **[16]** Learned counsel submitted further that the respondent was rightly convicted under s 304(a) of the PC and no interference by the court was called for.

ISSUE

C

[17] The issue that arises for our determination in this instant appeal is whether the respondent has been rightly convicted for an offence of culpable homicide not amounting to murder, punishable under s 304(a) of the PC or he should have been convicted for an offence of murder, punishable under s 302 D of the same Code.

OUR FINDINGS

[18] In our view, the discussion on the legal principles governing the E distinction between murder and culpable homicide not amounting to murder would be necessary to answer the issue raised.

[19] There are a plethora of cases which discuss the difference between murder and culpable homicide (see *Public Prosecutor v Megat Shahrizat bin* F *Megat Shahrur* [2011] MLJU 502; [2011] 8 CLJ 893; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; *Poh Weng Nam v Public Prosecutor* [2013] 4 CLJ 1096; and *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328; [2013] 4 CLJ 364).

G

[20] The safest way to approach the interpretation and application of ss 299 and 300 of the PC, ie, 'culpable homicide' and 'murder' seems to be to keep in focus the keywords used in the various clauses of these sections. In the case of *Phulia Tudu and anr v The State of Bihar (Now Jharkhand)* AIR 2007 SC 3215, H the court provided the following comparative table to help in appreciating the points of discussion between these two offences:

I

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done	Subject to certain exceptions culpable homicide is murder if the act which the death caused is done
INTENTION	
(a) With the intention of causing death; or	(1) With the intention of causing death; or
(b) With the intention of causing such bodily injury as is likely to cause death or;	(2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEDGE	
(c) With the knowledge that the act is likely to cause death.	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

(Emphasis added).

[21] The plain reading of the section makes it clear that the first clause of s 300 reproduces the first part of s 299. Therefore, ordinarily if the case comes within cl (a) of s 299, it would amount to murder.

[22] Clause (b) of sn 299 corresponds with cll (2) and (3) of s 300. Clause (b) of s 299 does not postulate any such knowledge on the part of the offender. Thus, if the assailant had no knowledge about the disease suffered by the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

[23] A comparison of cl (b) of s 299 with cl (3) of s 300 would show that the offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine but appreciable. The

word 'likely' means 'probably'. When the chances of a thing happening are greater than it's not happening, we say the thing will 'probably' happen. When the chances of its happening are very high, we say that it will 'most probably' happen. An injury sufficient in the ordinary course of nature to cause death only means that 'death will be the most probable result of the injury having regard to the ordinary course of nature'. The expression does not mean that death must result. Thus, the distinction between cl (b) of s 299 and cl (3) of s 300 would depend very much upon the degree of probability or likelihood of death in consequence of the injury.

[24] Clause (c) of s 299 and cl (4) of s 300 appear to apply to cases in which there is no intention to cause death or bodily injury but knowledge that the act is dangerous and therefore likely to cause death. Both clauses require knowledge of the probability of the act causing death. Clause (4) requires knowledge of a very high degree of probability. The following factors are necessary:

(a) that the act is imminently dangerous;

(b) that in all probability it will cause death or such bodily injury as is likely to cause death; and

(c) that the act is done without any excuse for incurring the risk. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder. Furious driving and firing at a mark near a public road are cases of these description.

[25] The academic distinction between 'murder' and 'culpable homicide not amounting to murder' was made clear in the case of *State of AP v Rayavarapu Punnayya* [1976] 4 SCC 382, where the Supreme Court of India observed as follows:

> ... that the safest way of approach to the interpretation and application of ss 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of ss 299 and 300 of the Code and the drawing support from the decisions of the court in *Virsa Singh v State of Punjab* and *Rajwant Singh v State of Kerala*, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the offences, which have been time and again reiterated. Having done so, the court said that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused death of another. Proof of such casual connection between the act of the accused and the death, leads to the, second stage for, considering whether that act of the accused amounts to culpable homicide as defined in s 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of s 300

of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in s 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of s 304, depending, respectively, on whether the second or the third clause of s 299 is applicable. If this question is found in the positives, but the case comes within any of the Exceptions enumerated in s 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of s 304 of the Penal Code.

The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so inter-twined and the second and the third stages so telescoped into each other, that it may be convenient to give a separate treatment to the matters involved in the second and third stages.

[26] Keeping in view the above principles, we proceed to consider whether in this instant appeal a case of murder against the respondent is made out or otherwise the offence said to have been committed would only be culpable homicide not amounting to murder punishable under s 304(a) of the PC.

[27] For convenience of discussion, we restate the proposition of law that in order to establish a case of murder punishable under s 302 of the PC, it is incumbent upon the prosecution to prove:

(i) the death of the deceased;

(ii) the deceased's death was caused by injury or injuries inflicted on the deceased;

(iii) the accused had caused the injury or injuries which resulted in the deceased's death; and

(iv) the act causing the death was committed with the mens rea under s 300(a), (b), (c) or (d) ie, if:

(a) the act is done with the intention of causing death;

(b) it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is like to cause death, and commits such act without any

A excuse for incurring the risk of causing death, or such injury as aforesaid.

B **[28]** Element (i) is a non-contentious issue. It is a common ground that the investigating officer ('PW13') had seen the body of the deceased at the scene and had together with the deceased's son ('PW8'), positively identified the deceased at the mortuary for the purpose of post-mortem.

C **[29]** As regards element (ii), the learned trial judge had appraised the evidence of the pathologist ('PW1'), as well as her post-mortem report ('exh P6'). PW1 concluded that the cause of death was the stab wound on the chest which was inflicted by a sharp object with one sharp edge and blunt edge akin to exh P16a.

D **[30]** As regards element (iii), the prosecution relied heavily on the evidence of PW7. Therefore, it is incumbent upon us to scrutinize her evidence carefully. PW7 testified that she had witnessed the tussle between the deceased and the respondent. PW7 deposed that she was sitting beside the house and overseeing her children before the brawl started. She went on to describe that the E respondent had attempted to sooth the crying baby by rocking the swing but failed miserably. The deceased then came out from the kitchen and rocked/carried (*digendong)* the baby to sleep. After the deceased had managed to put the baby to sleep, she went back to the kitchen and continued her chores. When asked whether the deceased was angry, PW7 replied: 'bisinglah dia F punya mulut sambil bersihkan ikan'.

[31] According to PW7, she then entered her kitchen and heard the deceased cried out faintly but PW7 paid her no mind thinking that the deceased must have suffered a hot water burn. PW7 was shocked when she G heard the deceased cried out again in pain (loudly). PW7 then saw the respondent standing at the kitchen door with one hand gripping the deceased's neck and the other holding a knife. The deceased struggled against him and fought to get away from the respondent. PW7 ran to the neighbour's house and shouted for assistance. PW7 was certain that there was no one else present at H the vicinity at the material time. PW7 had stood firm and remained unshaken in the cross-examination and nothing has been elicited to dislodge her testimony.

I **[32]** In his judgment, the learned trial judge found that there was no material before him to disbelieve the evidence of these two witnesses. His Lordship, after having considered the totality of PW7's testimony, coupled with PW8's evidence, held that it was the respondent who had inflicted the injuries which caused the deceased's demise. The respondent's conduct of putting his hand on the deceased's neck was also found to be consistent with

the fatal injury which was directed backward.

[33] It was contended by learned counsel for the respondent at trial that the deceased was assaulted by an unknown female because an unidentified DNA profile was found at the scene. With respect, the contention was misconceived. Out of all the human bloodstains taken and analysed, all proved to belong to either the deceased or the respondent, except a swab marked 'E3' or exh P19. We noted that the learned trial judge had specifically addressed this issue at p 274 of the appeal record as follows:

> The defence submitted that there is a possibility that someone else, other female who is still at large, inflicted those injuries on the deceased. However, as I have ruled earlier, the prosecution had established through its witnesses that there was no other person at the crime scene at that material time except the accused and the deceased. If indeed it was true that there was other female who inflicted the injuries on the deceased, the accused should have given assistance to his wife but instead he stabbed himself to commit suicide.

[34] The prosecution's case is based upon circumstantial evidence. The law relating to circumstantial evidence is well settled. Circumstantial evidence can be the sole basis for a conviction provided that the condition precedents before conviction on circumstantial evidence are fully established. The conditions are:

(a) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(b) the facts so established should be consistent with the hypothesis of the guilt of the accused; and

(c) circumstances should be conclusive in nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion to be consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(See *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; *Mazlan bin Othman v Public Prosecutor* [2012] MLJU 1786; [2013] 1 AMR 615; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 10; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22).

[35] In *Joseph v State of Kerala* [2005] 5 SCC 197 at p 203, the Supreme Court of India had explained under what circumstances conviction can be based purely on circumstantial evidence. It is observed, that:

> ... it is often said that though witness may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances

A are such to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accuse. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by peculiar facts and circumstances of each case. The whole effort and endeavour in the B case should be to find out whether the crime was committed by the accused and the circumstances proved from themselves into a complete chain unerringly pointing to the guilty of the accused.

[36] We agreed with the learned trial judge's finding on element (iii) that C there are sufficient circumstantial evidence that proved the nexus between the appellant and the deceased's death. The evidence, though circumstantial, is so cogent and strong such that it allowed the learned trial judge to draw the only irresistible inference that the respondent is the one who caused the deceased's death.

D

[37] The next element is intention or mens rea. As stated in the opening statement, the prosecution relies on limb (c) of s 300 of the PC. Intention or mens rea is not something which is capable of being established by direct E evidence; it is a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case. There are an abundance of literature in this area of jurisprudence (see *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497, *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174).

F

[38] It has been observed in *Ratanlal and Dhirajlal Law of Crimes* (25th Ed) at p 1304 that:

> Intention must be inferred not merely from the natural consequences of his act but from the act itself, and as the natural consequences of an act of the kind in question G would be death.

[39] Limb (c) under s 300 of the PC is in pari materia with the third limb of the Indian PC. In *Virsa Singh v State of Punjab* 1958 AIR 465, V Bose J, speaking for the court, explained the meaning and scope of cl 3. It was observed H at p 467 that the prosecution must prove the following facts before it can bring a case under s 300 third limb:

> Firstly, it must establish, quite objectively, that a bodily injury is present. Secondly, the nature of the injury must be proved; these are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular I bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of these three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is

purely objective and inferential and has nothing to do with the intention of the offender. A

[40] V Bose J explained further the third ingredient in the following words at p 468 of the judgment: B

> The question is not whether the prisoner intended to inflict a serious injury or a trival one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. C D

[41] These observations of V Bose J have become *locus classicus*. The test laid down in the case of *Virsa Singh* is now ingrained in our legal system and has become part of the rule of law. Thus, to sustain a charge of murder under limb (c) to s 300 of the PC, the prosecution must prove by evidence, either direct or circumstantial, from prosecution witnesses that the injury sustained by the deceased was intentionally caused by the accused. For the second part of the same limb (c), the prosecution must lead evidence through medical doctor that such injury was sufficient in the ordinary course of nature to cause the death of the deceased. This part of the enquiry is purely objective and has nothing to do with the intention of the offender. If the offender inflict injury of that kind, he must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional. E F G

[42] In this instant appeal, there was the evidence from the prosecution witnesses ie PW7 and PW8, who had testified to the effect that the injuries sustained by the deceased was attributable to the respondent. A sharp knife was used in the commission of the crime and the deceased had sustained several stab wounds on the vital part of her body. In the absence of other circumstances which would either totally or partially negate criminal intention, the respondent was deemed to have intended the consequences of his acts ie he had intended the injuries which were inflicted by him on the deceased's chest which, objectively, is a critical part of a human anatomy. H I

[43] We now turn to consider the evidence adduced by the prosecution that would evince the nature of the injury sustained by the deceased. We found that

the prosecution had established the second part of limb (c) through PW1's testimony. PW1 found that the cause of death was a stab wound (injury No 7) that was directed backward cutting the intercostal muscle, the pericardium, the ascending aorta, the right atrioventricular and the right atrium. PW1 testified that the said injury was sufficient in the ordinary course of nature to cause death. PW1 also stated in her evidence that the deceased was stab repeatedly and it was not accidental.

[44] In our view, the injury sustained by the deceased was fatal when the main artery was severed. This clearly evinced the intention on the part of the respondent to cause bodily injury to the deceased. As the evidence of the prosecution stood at the end of its case at the High Court trial, we were of the considered view that the instant appeal case would fall squarely within the ambit of s 300 of the PC. In absence of any evidence to the contrary, the respondent who had inflicted these injuries must have intended to kill the deceased. We found that the learned trial judge was right to hold that the prosecution had proved a prima facie case of murder and to call the respondent to enter defence upon the same. This in turn meant that the evidence adduced by the prosecution must be such that it can be overthrown only by evidence in rebuttal (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85).

[45] The defence raised by the respondent in the instant appeal was a mere denial and that part of the evidence has been summarised and alluded to in para 13 of our judgment. The learned trial judge had stated in unequivocal terms at p 277 of the record of appeal that:

> I do not believe the evidence of the accused that he did not stab the accused. The prosecution had adduced overwhelming evidence to show that it was the accused that inflicted the injuries on the deceased.

[46] However, the learned trial judge in reliance of the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, went on to amend the charge under s 302 of the PC to one under s 304(a) of the same Code on the following grounds:

> I am in doubt that the accused had the intention to kill the deceased. I find that the prosecution did not establish that the accused had the intention to kill the deceased ...
>
> In the instant case, based on the nature of injuries sustained by the deceased, there was evidence of an intention on the part of the accused to cause bodily injury to the deceased. However, having made a fine distinction between ss 299 and 300 I am of the view that based on the nature and number of injuries inflicted on the deceased, the accused had no intention to cause death to the deceased.
>
> I believe being sick for about ten days, the deceased must have not been able to bear

> the mumbling and nagging by the deceased and this had triggered him to stab the deceased ... I believe there was a physical fight between the accused and the deceased where the accused punched the deceased in the mouth before a knife was used to inflick the fatal injury ...
>
> I am of the opinion that in view of the injuries sustained by the deceased and given the circumstances the accused was then in, there was evidence of an intention on the part of the accused to cause bodily injuries on the deceased (which is likely to cause death).

[47] With respect, the learned High Court judge fell into a serious error. In *Tham Kai Yau*, having regard to the weapon (chopper) used to cause the multiple injuries leading to shock and haemorrhage, it would be a case under limb (c) of s 300 of the PC under normal circumstances. However, the pathologist's evidence was silent in respect of the nature of the injuries and its likely and natural effects. The Federal Court found that the absence of such positive statement of opinion emanating from the medical expert was fatal to the charge of murder that was premised upon limb (c) to s 300 of the PC. Since there was a doubt created, such doubt must be resolved in favour of the accused. However, in the instant appeal, there was clear testimony by the medical expert that the injury intentionally inflicted was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, the instant appeal was not a case which could be brought within the lesser offence of culpable homicide not amounting to murder in view of the nature of the medical evidence which we have alluded to earlier.

[48] It is useful to note here that the respondent had not taken the plea that his case fell in any of the exceptions to s 300 of the PC. On the contrary, he has taken the plea that he did not stab his wife which resulted in the death of the deceased. Therefore, the learned trial judge was in error in reducing the charge under s 300 to one under s 304(a) on the ground that the respondent stabbed the deceased because she had subjected him to constant nagging.

[49] Where such injuries which are intentionally inflicted by the respondent on the deceased, which were established by the pathologist (SP1) as being sufficient in the ordinary course of nature to cause death, it will indeed be a travesty of justice to hold that the respondent was guilty *only* of the lesser offence of culpable homicide not amounting to murder and punishable under s 304(a) of the PC.

CONCLUSION

[50] In the premises, we found that the learned High Court judge had erred in finding the respondent guilty for the offence punishable under s 304(a) of the PC. The resultant effect of our finding is the allowance of the appeal by

public prosecutor. The decision of the learned trial judge was set aside and substituted with a conviction for murder, punishable under s 302 of the PC. The respondent was sentenced to death as mandatorily prescribed by law. So ordered.

Appeal allowed, conviction and sentence for culpable homicide not amounting to murder set aside, original murder charge restored and the accused convicted on the same and sentenced him to death.

Reported by Ashok Kumar